

State of Delaware

Public Integrity Commission



ETHICS
TRANSPARENCY IN GOVERNMENT

ANNUAL REPORT
2017

Bonnie Smith, Chair
William F. Tobin, Jr., and Michele Whetzel, Vice Chairs

Commissioners

*Lisa Lessner * Jeremy Anderson, Esq.*
*Andrew Gonser, Esq. * (Vacant)*

STATE PUBLIC INTEGRITY COMMISSION

Annual Report - 2017

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I. Mission:

Administer, interpret and enforce the Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbying Laws.

Jurisdictional History

- ✓ **1991 – State Ethics:** Executive Branch officers and employees, including casual/seasonal; (over 52,000); non-legislative elected officials; State Board and Commission appointees (In 2015, over 300 Boards and Commissions).
- ✓ **1993 – Local Ethics:** 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they submit a Code for the Commission's approval. (As of 2015, only 8 have an approved Code, leaving PIC with 49 local jurisdictions).
- ✓ **1994 – Dual Compensation:** State and local employees and officials with a second elected or paid appointed job in government.
- ✓ **1995 – Financial Disclosure:** elected officials; State candidates; Judges, Cabinet Secretaries, Division Directors and equivalents. (2015: 329 officers filed).
- ✓ **1996 – Lobbying:** State lobbyists registration, authorization and expense reports (2015: 343 lobbyists; 1015 organizations; over 3000 expense reports).
- ✓ **2000 – Ethics:** School Districts and Boards of Education
- ✓ **2001 – Ethics:** Charter School Boards of Education
- ✓ **2010 – Organizational Disclosures:** State elected officials & candidates must disclose private organizations if they are Board or Council members.
- ✓ **2010 – Newark Housing Authority:** Newark's Code of Conduct included the Authority, but the General Assembly changed the law to make it a State agency so that PIC would have jurisdiction.
- ✓ **2012 – Lobbyists:** Report within 5 business days legislative bill number or administrative action number or title on which they are lobbying. Report weekly on lobbyists' legislative/administrative action.
- ✓ **2014 – Lobbyists:** Successfully proposed legislation to charge lobbyists a fee for failure to file their expense reports in a timely manner.



PUBLIC INTEGRITY COMMISSION

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Commission Structure

Appointments, Qualifications and Compensation

- 7 Citizens are the “public eye” on Government Ethics
- Nominated by the Governor; confirmed by the Senate
- Elect their own Chair
- Cannot be:
 - ✓ Elected or appointed official – State, Federal or Local
 - ✓ Holder of political party office
 - ✓ An officer in a political campaign
- Generally appointed from all three counties
- Terms – one full 7 year term; may serve until successor is appointed and confirmed
- Vacancies filled just as original appointments
- Pay - \$100 each official duty day; reimbursement of reasonable and necessary expenses

II. Commission Structure and Biographies of Commissioners and Staff

A. Commission Appointee Status

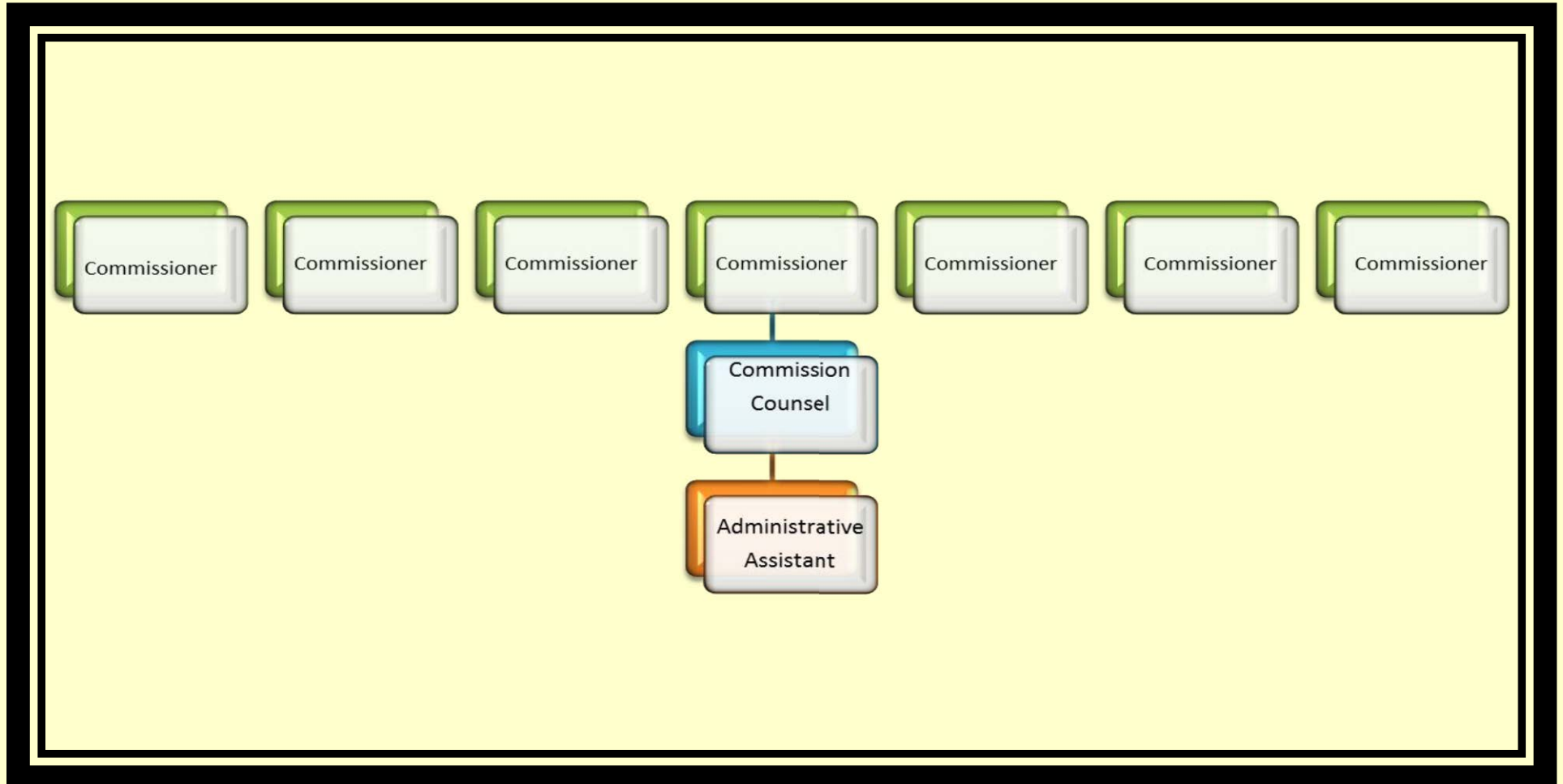
In 2017, the Commission said goodbye to Commission member Dr. Wilma Mishoe who resigned when she was appointed to serve as Acting President of Delaware State University. Her successor has not yet been appointed. As a result of Dr. Mishoe's resignation, the Commission does not have a member representing Kent County. Of the remaining six members, four members represent New Castle County and two members represent Sussex County.

B. Commission Staff

The Commission had a two person full-time staff from 1995 – 2017, an attorney and an administrative assistant, responsible for maintaining day-to-day operations. In early 2017, the Commission decided not to fill a vacancy for the administrative assistant position due to efficiencies in electronic recordkeeping and automated processes.

The Commission's attorney, beyond legal duties, conducts training, prepares Strategic Plans, Budgets, and performs other non-legal duties.

C. Organizational Chart



D. Biographies of Commissioners



Bonnie O'Day Smith
Chair

Ms. Smith was appointed to the Public Integrity Commission on March 26, 2014. Her term expires on March 26, 2021. Ms. Smith was elected Vice-Chair of Personnel in November 2015. In 2017, Ms. Smith was elected Chair.

Ms. Smith retired from Sussex County government in November 2013, after 44 years of dedicated service. During her employment, Ms. Smith worked her way up the career ladder from an entry level position to become the Director of Data Processing. Ms. Smith developed the computer software used by all County employees.

Ms. Smith received her Associates Degree from Delaware Technical & Community College in Georgetown and was a member of the school's first graduating class. During the course of

her career, she also received several training certificates from IBM.

Ms. Smith has previously served on the Delaware Technical and Community College Advisory Computer Information Systems Board. She has been involved in community activities such as the Lions Club and the Bridgeville Volunteer Fire Company. She attended Chaplain Chapel and is now attending Union United Methodist Church of Bridgeville. Ms. Smith has become a Fund for Women Founder, a Delaware organization that raises funds for various charities throughout the State.

She currently resides with her husband Thomas and their dog Greedy in Bridgeville, Delaware.



William F. Tobin, Jr.
Vice-Chair, Personnel

William F. Tobin was appointed to complete a few months of the remaining term of former Chair, Barbara Green. Mr.

Tobin was reappointed by the Governor in 2013 to serve his own 7-year term which expires in May 2020. He was elected Vice Chair, Policies & Procedures in 2012 and served in that role until he was elected Chair in September 2014. Mr. Tobin was re-elected Chair in 2015 and 2016. Having served the maximum three year term as Chair, Mr. Tobin was elected Vice-Chair, Personnel in 2017.

Mr. Tobin has served many years in private sector positions, both for-profit and non-profit. His work has included managing budgets of more than \$500,000, and other fiscal aspects such as inventory control, asset management and audit reviews. He is presently a credit manager and safety director for George Sherman Corporation, Lewes, Delaware. He also has an extensive background in sales, and trained and mentored new and existing sales staff.

His public sector experience ranges from 7 years of active duty in the U.S. Coast Guard, where he developed extensive emergency management skills, to training fire company members on Small Boat Handling in conjunction with the Delaware State Marine Police.

He has long been an active member and officer of organizations in the fire and rescue areas, serving as Treasurer and Co-Chair of the Fire and Rescue Boat Committee, Memorial Fire Company; Sussex County Technical Rescue Team as the Finance and Budget Executive, and member of the Delaware State Fire Police and Indian River Fire Company; and Executive Administrator, assistant treasurer, finance Board member of Georgetown American Legion Post #8, Ambulance State #93.

Aside from his interest in fire and safety, he is active in his community as Treasurer, Lower Delaware Shield and Square; American Legion Post #5

member; St. John's Masonic Lodge member; DE Consistory member, and Nur Temple member.

Commissioner Tobin resides in Harbeson, Sussex County, Delaware.



Michele Whetzel
Vice-Chair, Admin & Procedures

Mrs. Whetzel was confirmed as a Commissioner on June 15, 2016 for a seven-year term expiring in 2023. Mrs. Whetzel was elected Vice-Chair, Admin. & Procedures in 2016, and re-elected in 2017.

Mrs. Whetzel has lived in Delaware since 1976. She graduated from Newark High School and earned a degree in Finance and Economics from the University of Delaware. After college she worked in financial services and was a Trust Officer with American Guaranty & Trust Company. In 1993 Mrs. Whetzel chose to stay at home with her two (now adult) children. She became active in their schools, the neighborhood, and the greater community through charitable and volunteer activities. Mrs. Whetzel is currently the Executive Vice President and Chief Financial Officer for her family's property management business, Thinking Eye Dog, LLC.

For over 25 years Mrs. Whetzel has been an active volunteer in the nonprofit sector, serving on the Ministry of Caring Guild Board (treasurer), the New Castle County Adopt-a-Family Board, and the Delaware Community Foundation Board. She recently completed a two-year term as Chair of the Fund for Women and has held other offices on the organization's board since 2008. During her term as Chair the Fund increased its membership by 28% from 1,297 members to 1,660, the largest increase since the organization was founded in 1993.

In addition to the board activities, Mrs. Whetzel also volunteers for Kind to Kids and Child, Inc., serves as an advisor for the Delaware Community Foundation's New Castle County Youth Philanthropy Board, and is on the steering committee for ERANow. She also represents the Fund for Women on the Delaware Grantmakers Association and is starting her 10th year as a mentor through Creative Mentoring at Shue-Medill Middle School.

Mrs. Whetzel and her husband Robert reside in Newark.



Lisa Lessner

Mrs. Lisa Lessner was confirmed as a Commissioner on June 16, 2010 for a seven year term which expired in June 2017. Mrs. Lessner continues to serve on the Commission until her successor is appointed in 2018.

Mrs. Lessner is currently working as a fund raising consultant for Innovative Schools, a charter school management organization based in Wilmington.

For the past 17 years, Mrs. Lessner has actively worked as a community volunteer for various non-profits. She is currently a board member of the Boys and Girls Club of Delaware, Albert Einstein Academy, and Leading Youth Through Empowerment (LYTE), and also volunteers as a mentor for Creative Mentoring and in various capacities at Wilmington Friends School. Mrs. Lessner was a founder and board member of the Delaware Children's Museum for 14 years. Volunteering more than 1,000 hours a year, she chaired its Marketing and Exhibits Committees. In 1997, she was elected Vice President, until elected President in 2004. She served in that role until February 2010.

Mrs. Lessner's efforts for Delaware's first children's museum included extensive market research, writing an extensive business plan, attending conferences and networking with professionals in other States from children's museums, securing start-up funds, hosting fund raising events, hiring professional exhibit designers and architects, creating an exhibit master plan, hiring an executive director, and securing \$5 million in funds from the Riverfront Development Corporation for the museum's land and building. Her efforts were rewarded when the Museum opened in April 2010—on time and on budget.

While undertaking those efforts, she was also a Board member of Albert Einstein Academy (2001-2007), and a Delaware Theatre Company Board member (2009-2010).

Mrs. Lessner's business acumen began with a University of Delaware Bachelor of Science Degree in Accounting. That was followed by an MBA in Health Care Administration from Widener University, Chester, Pennsylvania. After interning for IBM and Morgan Bank, she worked for the Hospital of the University of Pennsylvania in a variety of positions, including Budget Specialist, Budget Manager, Senior Associate for Clinical Effectiveness and Senior Associate to the Executive Director. Later, she used her skills as an independent consultant for the Clinical Care Associates, University of Pennsylvania Health System. Her consultant work encompassed being the temporary Chief Financial Officer, and working on special projects, including establishing financial and human resources policies and procedures.

Mrs. Lessner and her family reside in Wilmington, DE.



Andrew W. Gonser, Esq.

Mr. Gonser was confirmed to serve a seven-year term on the Commission in June 2011, with his term ending in June 2018. In 2012, he was elected to serve as Vice Chair, Personnel and re-elected in 2013 and 2014. Mr. Gonser relinquished his position as Vice-Chair in 2015, per PIC Rules limiting the maximum term of office to three years.

Mr. Gonser is a partner in the law firm of Gonser and Gonser in Wilmington. He is experienced in all aspects of Family Court matters from divorce, property division, custody and visitation, to paternity issues, guardianships and adoptions. He currently serves as Chair of the Family Law Section of the Bar Association and has won numerous awards including being Voted Top Family Law Attorney in Delaware Today multiple times.

After graduating *cum laude* from Widener University of School of Law in 2004, he clerked for the Honorable Jan R. Jurden, Delaware Superior Court. He is admitted to practice in all Delaware Courts, the U.S. District Court (Delaware), and the U.S. Supreme Court.

His undergraduate degree is in English from the University of Delaware, where he received the Division I Men's Soccer Letterman's Award.

Mr. Gonser is actively engaged in legal and non-legal activities. He is a volunteer attorney for the Legal Self-Help Center and volunteers as a Guardian *ad Litem* for children in Delaware's foster care system. He also is a member of the Delaware State Bar Association and the Melson-Arsht Inns of Court.

Mr. Gonser resides in Wilmington with his wife and five children.



Jeremy D. Anderson, Esq.

Mr. Anderson was appointed on June 30, 2011. His term expired in June 2017. Mr. Anderson continues to serve until his successor is appointed in 2018.

Mr. Anderson, a principal at the law firm of Fish & Richardson, PC, leads and tries corporate and complex commercial cases in the Delaware Court of Chancery. Mr. Anderson handles technology-related cases that are brought to protect and defend the intellectual property of companies across several industry sectors such as Life Sciences, Computer Software, and Media and Entertainment. He has successfully represented clients in actions involving non-practicing entities (NPEs) regarding the fraudulent transfer of patents and breaches of covenants not to sue. He obtained a motion to dismiss a multi-forum shareholder derivative lawsuit that was based on his client's substantial monetary settlement with the federal government recently, and in another case defended a preliminary injunction seeking to stop a technology company from filing a patent infringement action in federal court.

As the head of Fish & Richardson's Corporate Governance and Chancery Litigation Practice, Mr. Anderson also

represents corporations in high-profile cases involving mergers and acquisitions, stock appraisal, indemnification of officers and directors, demands for corporate records and misappropriation of trade secrets.

Mr. Anderson is the co-author of Technology Litigation in the Delaware Court of Chancery, a treatise that provides comprehensive analysis of technology-related claims such as breach of fiduciary duty, misappropriation of trade secrets, breach of contract, unfair competition, civil conspiracy, and aiding and abetting. He is a thought leader on stock appraisal actions, and has authored articles that have been quoted in the Wall Street Journal, New York Times, Financial Times and Bloomberg. He frequently contributes to the "Chancery Daily" as a guest columnist and to Fish & Richardson's commercial litigation blog.

Mr. Anderson is a member of the Delaware Bar Association, where he served as Assistant to the President and as member of the Executive Committee from 2010-2011. In October 2007, Mr. Anderson founded the Delaware Chapter of the J. Reuben Clark Law Society, a service organization that promotes fairness and virtue founded on the rule of law. He has been named a "Delaware Rising Star" by Super Lawyers in multiple years.

Mr. Anderson received his law degree from Georgetown University Law Center, in Washington, D.C., where he was the Senior Editor for Law and Policy in International Business. After graduation, he clerked for the Honorable Kent A. Jordan, United States District Court for the District of Delaware.

Mr. Anderson resides in Hockessin, Delaware.

D. Commission Staff

Deborah J. Moreau, Esq. Commission Counsel

As an independent agency, the Commission appoints its own attorney. 29 *Del. C.* § 5809(12). Ms. Moreau was appointed in June 2013, replacing the Commission's previous counsel of 18 years.

A Widener University School of Law graduate (*cum laude*), Ms. Moreau was a member of the Delaware Journal of Corporate Law. During law school she received two awards for her writing submissions. The Herman V. Belk Memorial Award was given in recognition of excellence in writing for an article written to gain admission to the law review in 2003. In 2004, she received the Donald E. Pease Best Student Article Award. Ms. Moreau's (*ne* Buswell) award-winning article was published in the law review. (Foreign Trade Antitrust Improvements Act: A Three Ring Circus – Three Circuits, Three Interpretations (Delaware Journal of Corporate Law, Vol. 28, No. 3, 2004)). The article has been cited in numerous professional materials. During her third year of law school, Ms. Moreau worked as an intern at the Delaware Department of Justice and was provisionally admitted to the Delaware Bar under Delaware Supreme Court Rule 55. That early admission allowed Ms. Moreau to prosecute misdemeanor cases in Family Court before graduation from law school.

Ms. Moreau was formally admitted to practice law in Delaware in 2004. The following year she was admitted to the U.S. Third Circuit Court of Appeals. Ms. Moreau continued her career at the

Delaware Department of Justice as a Deputy Attorney General for the Criminal Division. While she was a prosecutor, Ms. Moreau handled hundreds of cases, in a variety of courts. She has practiced in Family Court, the Court of Common Pleas and Superior Court. Her varied caseloads included domestic violence, juvenile crime, sexual assaults, guns, drugs, property, robbery, burglary, and murder. Ms. Moreau's work as a prosecutor allowed her to gain extensive trial experience.

Ms. Moreau resides in Harrington, Delaware with her husband.



III. Laws Administered by the Commission

❖ Subchapter I, Code of Conduct

Executive Branch and local government ethics;

Policy

State or local employees or officials holding dual government jobs with procedures to monitor and prevent “double-dipping;”

❖ Subchapter II, Financial and Organization Disclosures

Executive, Legislative and Judicial Branch public officer’s annual report of financial interests, such as assets, creditors, income, and gifts. All State elected officials and State candidates must also disclose private organizations of which they are a Board or Council member.

❖ Subchapter IV, Lobbying

Lobbyists’ registration, authorization, expense reports, and specific legislative or administrative actions on which they are lobbying State officials or employees.

❖ Subchapter III, Compensation

A. Subchapter I, Code of Conduct – Ethical Standards

Purpose and Jurisdiction:

Twelve (12) rules of conduct set the ethical standards for “State employees,” “State officers,” and “Honorary State Officials,” in the Executive Branch. 29 *Del. C.* § 5804(6), (12) and (13). It also applies to local governments, unless the local government has a PIC-approved Code that is as stringent as State law. 29 *Del. C.* § 5802(4). The purpose is to instill the public’s respect and confidence that employees and officials will base their actions on fairness, rather than bias, prejudice, favoritism, etc., arising from a conflict, or creating the appearance thereof. 29 *Del. C.* § 5802.

Personal Jurisdiction – State Level:

The Code of Conduct applies to all Executive Branch employees (rank and file, including part-time), officers (elected and appointed senior level Executive Branch officials), and honorary State officials (appointees to more than 300 Boards and Commissions). Approximately 53,000 persons are in those State categories.

Personal Jurisdiction – Local Level:



At the local level, the number of employees, officers and officials in the local governments over which the Commission has jurisdiction is unknown.

In **2017**, local governments who had adopted their own Codes of Conduct included: New Castle County, Dover, Lewes, Millsboro, Newark, Smyrna, Delaware City, and Wilmington. As they have their own Code, the Commission no longer has jurisdiction over their employees, officers, and appointed officials. The remaining 49 local governments are under PIC's

jurisdiction. In 2013, PIC approved a proposed Code of Conduct for the Town of Dewey Beach which has not yet been formally adopted by the town council.

Subject Matter Jurisdiction:

The Code of Conduct restricts participating in an official government capacity if there is a personal or private interest in a matter before them; bars all employees, officers and officials from representing or assisting a private enterprise before their own agency in their private capacity; bars officers (senior level officials) from representing or assisting a private enterprise before any agency; limits public servants in obtaining contracts with the government entity with which they serve; restricts their activities for 2 years after

terminating State employment. 29 *Del. C.* § 5805. The law also restricts acceptance of gifts, outside employment or anything of monetary value; use of public office for personal gain or benefit; improper use or disclosure of government confidential information; and/or use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency. 29 *Del. C.* § 5806. The Code also bars conduct that creates a justifiable impression, or that may “raise public suspicion,” of improper conduct, 29 *Del. C.* § 5802(1) and § 5806(a). Thus, the Commission considers if there is an appearance of impropriety.

The appearance of impropriety, under the Code of Conduct, is evaluated using the Judicial Branch standard, as interpretations of one statute may be used to interpret another when the subject (ethics) and the standard (appearance of an ethics violation) apply in both (public servant) cases. *Sutherland Stat. Constr.* § 45-15, Vol. 2A (5th ed. 1992).

Penalties:

Both criminal and administrative penalties may be imposed.

(1) Criminal Prosecution: The General Assembly, in passing the law, found that some standards of conduct are so “vital” that the violator should be subject to criminal penalties. 29 *Del. C.* § 5802(2). Four (4) rules carry criminal penalties of up to a year in prison and/or a \$10,000 fine. 29 *Del. C.* § 5805(f). Those rules are that employees, officers, and honorary officials may not: (1) participate in State matters if a personal or private interest would tend to impair judgment in performing official duties; (2) represent or assist a private enterprise before their own agency and/or other State agencies; (3) contract with the State absent public notice and bidding/arm’s length negotiations; and

(4) represent or assist a private enterprise on certain State matters for 2 years after leaving State employment. 29 *Del. C.* § 5805(a)(2). Beyond referring suspected Code violations for criminal prosecution (see more information below), if a majority of Commissioners finds reasonable grounds to believe a violation of other State or Federal laws was violated, they may refer those matters to the appropriate agency. 29 *Del. C.* § 5807(b)(3) and(d)(3); § 5808(A)(a)(4); and § 5809(4).

In 2015, PIC's criminal enforcement power was enhanced by the Attorney General's creation of the Office of Civil Rights and Public Trust ("OCRPT"). Now, when PIC uncovers a Code of Conduct violation for which there are criminal penalties, the matter may be referred to OCRPT for further investigation and possible criminal prosecution. In **2017**, PIC referred one matter, involving a possible violation of the two year post-employment restriction set forth in 29 *Del. C.* § 5805(d). In that matter, a school district employee erroneously applied the State's pension rules to his post-employment activities. The misapplication of the law resulted in the employee believing that the post-employment restriction was for six months rather than the two years required by the Code of Conduct. Rather than prosecution, the Commission opted for education and remediation.

(2) Administrative Sanctions: Violating the above rules may, independent of criminal prosecution, lead to administrative discipline. 29 *Del. C.* § 5810(h).

Under some rules both criminal and/or administrative sanctions may occur, but violating the following rules results only in administrative action: (1) improperly accepting gifts, other employment, compensation, or anything of monetary value; (2) misuse of public office for private gain or unwarranted privileges; and (3) improper use or disclosure of confidential information. 29 *Del. C.* § 5806(b), §5806(e) and § 5806(f) and (g).

Disciplinary levels: (1) reprimand/censure of any person; (2) removing, suspending, demoting, or other appropriate disciplinary action for persons other than elected officials; or (3) recommending removal from office of an honorary official. 29 *Del. C.* § 5810(h).



B. Subchapter II, Financial and Organizational Disclosure Requirements

Both the financial disclosure report and the organizational disclosure are snapshots of any interest held by an official as of the date reported. The decision on whether those interests, or any acquired after that date but not yet reported, create a conflict of interest, is based on the conflict laws for that particular officer. Executive Branch elected officers are subject to the State Code of Conduct; Legislators are subject to the Legislative Conflicts of Interest law; and Judicial officers are subject to the Judicial Code of Conduct.

FINANCIAL DISCLOSURE:

Purpose:

Subchapter II is meant to instill the public's confidence that its officials will not act on matters if they have a direct or indirect personal financial interest that may impair objectivity or independent judgment. 29 Del. C. § 5811. Compliance, in part, is insured when they report financial interests shortly after becoming a public officer, (14 days), and

each year thereafter on March 15, while a public officer. 29 *Del. C.* § 5813(c). Identifying the interests helps the public officer recognize a potential conflict between official duties and personal interests that may require recusal or ethical guidance.

Personal Jurisdiction:

More than 350 “public officers” in the Executive, Legislative, and Judicial branches must file financial disclosure reports within 14 days of becoming a public officer and on March 15 each year thereafter. 29 *Del. C.* § 5813(c). Filers include: All Executive and Legislative Branch elected officials; all cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. 29 *Del. C.* § 5812(n)(1). PIC received 334 Financial Disclosure filings between January 1st and March 15th in **2017**. As State candidates must also file, the number of filers per year varies depending on the number of candidates in a given year.

Subject Matter Jurisdiction:

Assets, creditors, income, capital gains, reimbursements, honoraria, and gifts exceeding \$250 are reported. Aside from their own financial interests, officials must report: assets held with another if they receive a direct benefit, and assets held with their spouses and children, regardless of direct benefits. 29 *Del. C.* § 5813.

Penalties:

Willful failure to file a report is a Class B misdemeanor. Knowingly filing false information is a Class A misdemeanor. 29 *Del. C.* § 5815. The Commission may refer suspected violations to the Commission Counsel for investigation and to the AG for investigation and prosecution. *Id.* The penalties are: (1) up to six months incarceration and/or a fine of up to \$1,150 for a Class B misdemeanor, 11 *Del. C.* § 4206(b); and (2)

up to one year incarceration and a fine of up to \$2,300 for a Class A misdemeanor, 11 *Del. C. § 4206(a)*. The Court may also require restitution or set other conditions as it deems appropriate. 11 *Del. C. § 4206(a) and (b)*.

ORGANIZATIONAL DISCLOSURES:

Purpose:

Potential conflicts can arise from associational interest, even without a financial interest, and if the organization seeks action by the General Assembly, the Governor, Lt. Governor, Treasurer, Auditor, Insurance Commissioner, or Attorney General, the annual reporting reminds them of that possibility. The reports are public records, and may be requested on the [FOIA form](#), on the Commission's website. That allows the public to also monitor the financial and associational interests of these officials.

Personal Jurisdiction:

State elected officials and Candidates for State office are required to disclose their memberships on councils or boards. 29 *Del. C. § 5813A*. Other public officers, e.g. cabinet secretaries, division directors, and their equivalents are not required to file this information.

Subject Matter Jurisdiction:

Elected officials and candidates must disclosure the name and address of every nonprofit organization, (excluding religious organizations), civic association, community association, foundation, maintenance organization, or trade group incorporated in the State or having activities in the State, or both, of which the person is a council member

or board member. 29 *Del. C.* § 5813A.

Penalties:

Same as for financial disclosure reporting violations.



C. Subchapter III - Compensation Policy – “Anti-Double Dipping Law”

Purpose:

Some elected and paid appointed officials hold a second job with State agencies or local governments. Taxpayers should not pay an individual more than once for overlapping hours of the workday. 29 *Del. C.* § 5821(b). To build taxpayers' confidence that such employees and officials do not “double-dip,” those with dual positions must have their Supervisor verify time records of hours worked at the full-time job on any occasion that they miss work due to the elected or paid appointed position. 29 *Del. C.* § 5821(c) and § 5822(a). The full-time salary may be prorated, unless the dual employee uses leave, compensatory time, flex-time or personal time. *Id.*

Jurisdiction:

The number of people to whom this law applies varies based on how many State and local government employees hold dual, government (state, municipal, county)

employment.

For those holding dual positions, who also are subject to the Code of Conduct—Executive Branch and local governments--the “double-dipping” restrictions are reinforced by the ethical limits on holding “other employment.” 29 *Del. C.* § 5806(b). Complying with the ethics provision is extra insurance against “double-dipping,” and also helps insure the “other employment” does not raise ethical issues. Further assurance against double-dipping is that the statute requires the Auditor to annually audit time records. 29 *Del. C.* § 5823. Generally, the audit is comprised of time records for General Assembly members who are also State employees.

In January **2017**, PIC received the Dual Compensation Report for CY 2015 and CY 2016 from the State Auditor’s Office. Like the previous report which covered CY 2014, the report found that the State does not have adequate rules and procedures in place to allow for adequate oversight of the Dual Compensation law. Most significantly, the population of individuals who received dual compensation from government entities was unable to be determined from data available to PIC. While PIC does collect financial information from the State’s Public Officers, it does not have jurisdiction to collect that information from individuals employed by towns, municipalities or counties within the State who may collect dual government income. Substantial changes to the Dual Compensation law are necessary to allow PIC to gather the information necessary to properly administer this portion of the code. To that end, HB 252 was introduced in the General Assembly in January 2016, attempting to remedy some of the problems identified in the State Auditors CY 2014 report. The Bill was never released from committee. A similar Bill was introduced in March **2017**, HB 73, which is still in committee. PIC

supports any effort to strengthen and improve our ability to collect and oversee the Dual Compensation law. That includes collecting and analyzing Financial Disclosures from municipal and county employees, as long as it receives additional manpower and resources to ensure the additional responsibilities are properly administered.

Penalties:

Aside from pro-rated pay where appropriate, discrepancies are reported to the Commission for investigation, and/or the AG for investigation and prosecution under any appropriate criminal provision. 29 *Del. C.* § 5823.



D. Subchapter IV – Lobbyist Registration and Reporting

Purpose:

Individuals authorized to act for another, whether paid or non-paid, must register with the Commission if they will be promoting, advocating, influencing or opposing matters before the General Assembly or a State agency by direct communication. 29 *Del. C.* § 5831. Lobbying registration and reporting informs the public and government officials whom they are dealing with so that the voice of the people will not be “drowned out by the voice of special interest groups.” *United States v. Harris*, 347 U.S. 612 (1954).

Jurisdiction:

When PIC began administering the lobbying registration law in 1996, there were approximately 200 organizations represented by lobbyists. At the end of **2017**, 331 lobbyists, representing 1247 organizations, were registered.

Reporting Requirements:

Each lobbyist is to file quarterly reports revealing direct expenditures on General Assembly members and/or State agency members. 29 *Del. C.* § 5835(c). That results in 4988 expense reports. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value. *Id.* In **2017**, lobbyists reported expenditures totaling \$64,145.27. In addition to reporting expenditures, lobbyists are also required to report their lobbying activity. Lobbyists must report legislation by bill number or administrative action by number or title, within 5 business days of lobbying a State official. 29 *Del. C.* § 5836. “Lobbying” consists of direct communication with a State employee or official, including General Assembly members, for the purpose of advocating, promoting, opposing, or influencing legislation or administrative action. 29 *Del. C.* § 5831(5). The law also required that all registration, expense reports, and the new “Lobbying Activity Report” be filed online. 29 *Del. C.* § 5832(a).

Beyond the “Lobbying Activity Reports” that the lobbyists must file, the 2012 legislation required PIC to report all lobbying activity to the General Assembly on at least a weekly basis while the General Assembly is in session. 29 *Del. C.* § 5836(d). Further, it required that a [searchable public database](#) be created so that the public could search for information on the names of lobbyists and their employers, expense reports, and the Lobbying Activity Report. 29 *Del. C.* § 5836(d).

In 2013, the Public Integrity Reporting System (PIRS) was created in an effort to accommodate the new legislative reporting requirements. The new database was announced as the Web 2.0 Award winner in the “Harnessing the Power of Civic Media”

category by the Public Technology Institute (PTI). Users of PIRS can see which lobbyists are involved in specific legislation or administrative regulation, and view lobbyists' employers and financial disclosures. The new system also made it easier for lobbyists and public officials to submit required lobbying and gift-related reports online. The PIRS online interface is also mobile-friendly, allowing lobbyists to report, and citizens to search using smartphones, tablets and other mobile devices.

Penalties:

Administrative: PIC may impose the administrative penalty of cancelling a lobbyist's registration for failure to timely file their expense reports at the end of each calendar quarter. They may not re-register or act as a lobbyist until all delinquent authorizations and/or reports are filed. *Id.* Obviously, this affects their ability to represent an organization in which they are interested enough to volunteer, or affects their job performance if they cannot perform their paid duties. Recognizing the impact on lobbyists if their registrations are cancelled, the Commission sends several failure-to- file notices via e-mail, followed by certified letter. If the lobbyist does not respond, before their registration is cancelled, the organization which they represent is also notified. The names of delinquent filers are available on PIC's website by searching lobbyist reports by quarter.

Over time the administrative penalty ceased to be an effective compliance tool. In the first quarter of 2014, there were 79 delinquent lobbyists. By the end of the third quarter there were over 100 delinquent lobbyists. Compare those numbers with a total of 15 delinquent lobbyists for the fourth quarter of 2013.

Financial: As a result of the increasing number of delinquent filers, in 2014 PIC successfully introduced legislation to impose a financial penalty on lobbyists for failure to file expense reports in a timely manner. Beginning in 2015, delinquent lobbyists were required to pay a \$25 fine for the first day of their delinquency. Thereafter, an additional \$10 per day accumulated to a maximum fee of \$100. Lobbyists may not resume lobbying until all fees have been paid and all delinquent reports have been filed. In the fourth quarter of **2017**, the number of delinquent filers was reduced to 10. In **CY2017**, PIC collected \$2025 in late fees.

Criminal: Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. 29 *Del. C.* § 5837. Unclassified misdemeanors carry a penalty of up to 30 days incarceration and a fine up to \$575, restitution or other conditions as the Court deems appropriate. 11 *Del. C.* § 4206(c).



IV. Methods for Achieving Compliance

(1) Training and Publications - 29 Del. C. § 5808(A)(a)(1)

As the Commissioners normally meet monthly, the day-to-day work of providing guidance and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, etc., are the Commission Counsel's statutory duties. *Id.*

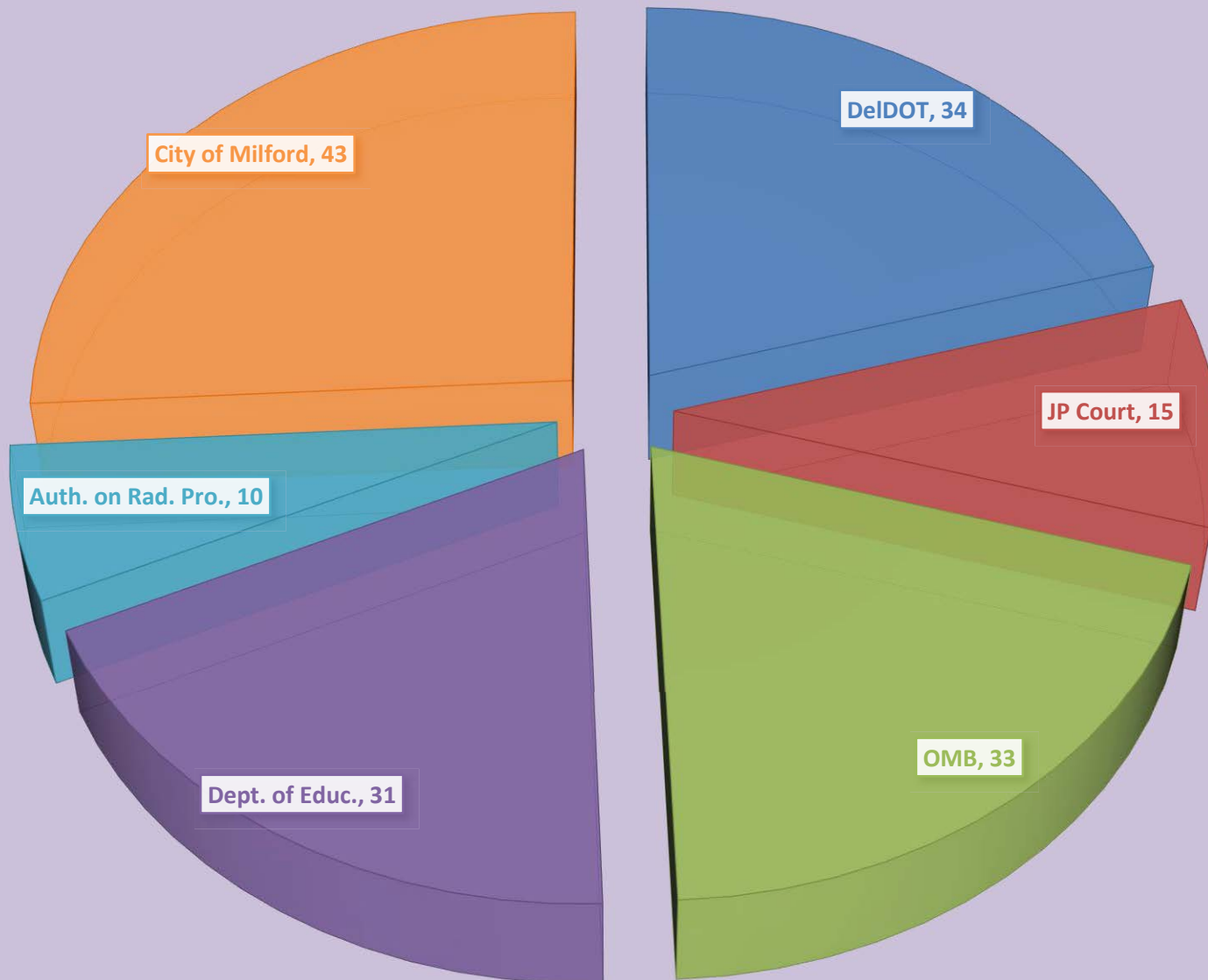
To best assist government officials and lobbyists in understanding and complying with the law, the Commission's primary focus is on training. Training is reinforced by handouts and publications which can be reviewed later. For quick reference, an Ethics Brochure with the 12 rules of conduct with some brief case examples is provided. It also has procedures for obtaining advice or waivers, and filing complaints.

Opinion synopses are available on PIC's website. The synopses are sorted by topic and include a summary of all matters decided by the Commission from 1991 to 2017. As individuals encounter similar situations, they can refer to the cases. The web site also includes the Delaware Code of Conduct, all Ethics Bulletins, a brochure on Delaware's gift laws, the Commission's rules and its Annual Reports. For Financial Disclosure filers

and Lobbyists, the web site has instructions for on-line filing. Lobbyists can link to the Legislative Bill Drafting Manual if drafting legislation for clients. The web site also includes links to related laws such as the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

In **2017**, the Commission presented 8 training classes to a total of 166 attendees. The training classes were presented to a wide variety of state, county, and legislative entities. In an effort to reach more State employees, PIC created an online training module which is available through the Office of Management and Budget's Training Website. The module is a 30 minute introduction to common ethics issues facing State employees. It does not replace the more in-depth, in-person training sessions. In **2017**, 477 employees completed the training module. The drop in the number of attendees at the live training events is likely due to saturation of the available training audience. PIC intends to focus more training resources to school districts and municipalities in order to reach a larger audience.

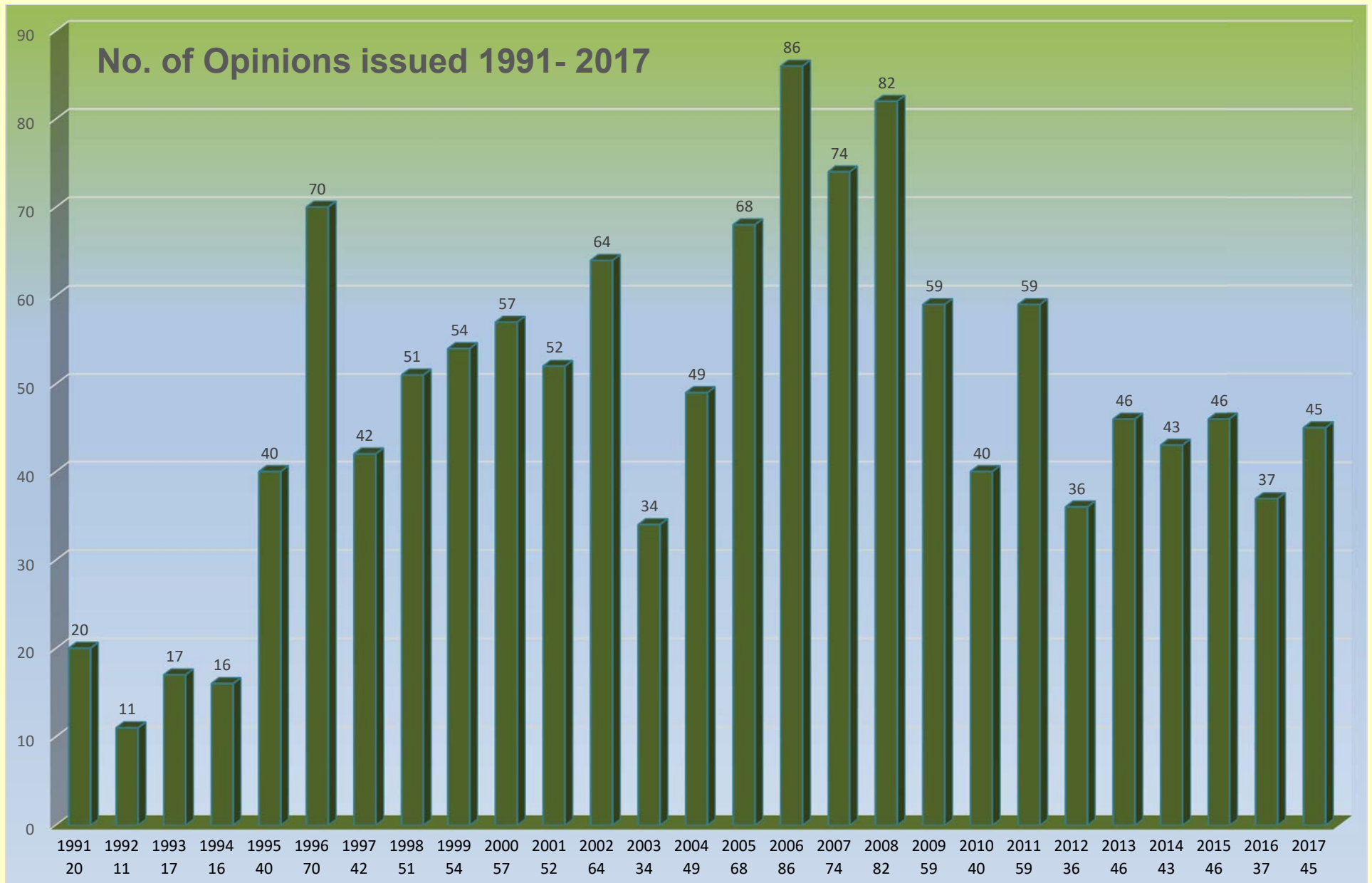
2017 Live Ethics Training by Agency and Number of Attendees



(2) Advisory Opinions - 29 Del. C. § 5807(c).

Any employee, officer, honorary official, agency, or lobbyist may seek the Commission's advice on the provisions applying to them. While training and publications expose those subject to the law to a broad and general view, the Commission's advisory opinions and waiver service on particular fact situations gives the individual personal attention on a potential conflict, guiding them through the steps that would prevent crossing the ethics line. While advisory opinions are non-binding, if the individual follows the advice, the law protects them from complaints or disciplinary actions. 29 Del. C. § 5807(c). Synopses of those opinions later become learning tools at training classes and are available on our website.

In **2017**, PIC acted on 45 requests for written advice. 37 formal advisory opinions were issued by the Commission and Commission Counsel responded to 8 requests for written informal advice. (See chart below). The number of requests for opinions has been fairly stable over the past five years. This is likely due to the fact there have not been any changes to the Code of Conduct. The Commission typically sees spikes in the number of requests when there is a change in the Code.



(A) Waivers - 29 Del. C. § 5807(a)

Any employee, officer, honorary official, agency, or lobbyist may seek a waiver. In rare cases, an individual may need to deviate from the law. The Commission may grant waivers if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) an undue hardship exists for the agency or employee. Waivers are open records so the public knows why a deviation from the law was allowed in a particular case. As some standards are so “vital” that they carry criminal penalties, making the information public further instills confidence that an independent body makes the decision. It also gives the public better exposure to the Commission’s deliberation process which may not be as clear when only a synopsis, that cannot identify the individual by name or through sufficient facts, is permitted.

In **2017**, four waivers were granted. *Commission Op. Nos. 17-16; 16-52 (renewed); 17-38; 17-45.* (See Appendices A-D). When a waiver is granted, the proceedings become a matter of public record. Those decisions are also available on the Commission’s website.

(B) Complaints - 29 Del. C. § 5810(a).

Any person, public or private, can file a sworn complaint. The Commission may act on the sworn complaint, or its own initiative. A majority (4) must find “reasonable grounds to believe” a violation may have occurred. 29 Del. C. § 5808(A)(a)(4). If probable cause is found, the Commission may conduct a disciplinary hearing. 29 Del. C. § 5810. The person charged has statutory rights of notice and due process. Violations must be proven by clear and convincing evidence. If a violation is found, the Commission may impose administrative discipline. 29 Del. C. § 5810(d). It may refer substantial evidence

of criminal law violations to appropriate federal or State authorities. 29 Del. C. § 5810(h)(2). Frivolous or non-merit complaints, or those not in the Commission's jurisdiction, may be dismissed. 29 Del. C. § 5809(3).

In **2017**, the Commission received three properly submitted complaints. Two were dismissed for failure to properly allege a violation of the Code of Conduct. The remaining complaint was investigated and subsequently dismissed for failure to state a claim and lack of jurisdiction.

A complaint must be in writing, allege violations of specific portions of the Code of Conduct with supporting facts, and be properly notarized. The correct form of notarization is below:

29 Del. C. § 4328(3) For a verification upon oath or affirmation:

State of.....

County of.....

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

(signature of notarial officer)

(Seal)

(title and rank)

(my commission expires:.....)



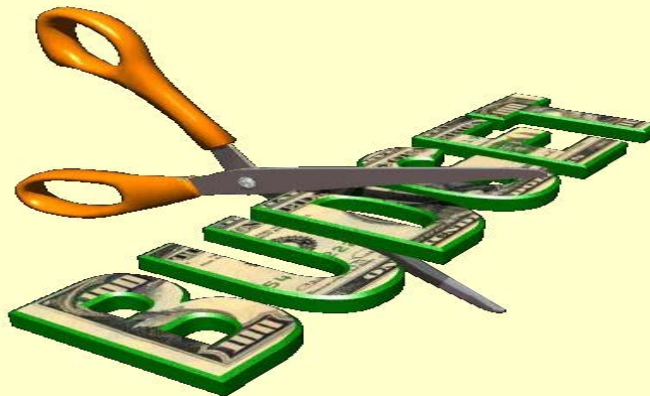
V. FOIA Requests

In **2017**, PIC responded to 14 requests for information under the Freedom of Information Act (FOIA). The FOIA requests were submitted by a mix of news media, citizens, and private political organizations. Due to the efficiencies of the PIRS database, PIC was able to respond to all of those requests within 5 days.



VI. Funding

In **FY 2018**, which includes the last half of the 2017 calendar year, the General Assembly appropriated \$185,200 for PIC, with an operating budget of \$18,400. That amount is the smallest operating budget since PIC was created in 1996 when the operating budget was \$40,100. Today, PIC's operating budget is 55% less than in 1996. When adjusted for inflation, the operating budget has been **cut** by 72% over the past 20 years. Meanwhile, PIC's duties continue to increase.





VII. Legislation

Legislation:

During the 2017 legislative session HB 53 was introduced to compel municipal employees to file Financial Disclosure forms with PIC. The Bill is currently in committee.



VIII.Future Goals

The Commission's focus will be to continue to emphasize education of employees, officers, officials, and lobbyists with the limited resources at our disposal.



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VIA EMAIL

May 19, 2017

17-16—Contracting with the State (Waiver Granted)

Hearing and Decision By: William F. Tobin, Jr., (Chair); Michele Whetzel (Vice Chair);
Commissioners: Andrew Gonser, Esq., Dr. Wilma Mishoe, Jeremy Anderson, Esq.

Dear Ms. Sullivan and Ms. Makransky,

Thank you for attending the Public Integrity Commission meeting on May 16, 2017. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your request for a waiver of the public notice and bidding requirement for all contracts awarded to State employees in excess of \$2000. The Commission's reasoning is set forth below. The Commission publishes all waivers so the public will know that the prohibited behavior has been reviewed and approved by the Commission.

I. FACTS

Ms. Sullivan is employed by the Department of Education ("DOE") as a casual/seasonal investigator in the Child Protection Unit ("CPU"). Her duties include investigating teachers who have engaged in misconduct as defined by the DOE's statutes and reviewing license applications. Ms. Makransky is a Deputy Attorney General employed by the Department of Justice's Civil Division to provide legal advice to various state boards and commissions.

Ms. Sullivan would like to contract with the Delaware Interscholastic Athletic Association ("DIAA") to conduct an investigation into an incident that occurred at a basketball game between A.I. du Pont High School and the Delaware Military Academy on February 16, 2017, which involved allegations of racial slurs and other misconduct. The incident was reported the following day by various Delaware news outlets. In the days following the incident A.I. du Pont's school officials decided that their basketball team would forfeit the last game of the season and also declined to participate in an interscholastic basketball tournament.

The DIAA, a division of DOE, is responsible for promoting fair competition, sportsmanship and ethical behavior in interscholastic school sports¹. A request for an independent investigation of the incident was first raised before the DIAA board on March 9, 2017 by a group of athlete's parents and Wilmington City Councilman Jay Street. Their request was approved at the April 13, 2017, meeting.

¹ <http://www.doe.k12.de.us/diaa>

The board voted to hire an independent, unbiased investigator from either Kent or Sussex County who had some familiarity with interscholastic athletics. DIAA contacted two licensed investigators but were unable to hire either of them due to illness and a possible conflict of interest. The deadline to complete the investigation, May 31, 2017, is necessary in order to interview witnesses and students before the end of the school year. A formal, written report is due on June 7, 2017.

DIAA would like to contract with Ms. Sullivan to conduct the investigation. The anticipated amount of the contract is between \$5,000 and \$10,000. At the hearing Ms. Makransky and Ms. Sullivan indicated that the amount would likely be near \$6300. Ms. Sullivan based her estimated costs on the typical rate DOE pays to investigators, \$150/hour, and then cut that by 50% resulting in an hourly rate of \$75. Due to the impending May 31 deadline, DIAA requested a waiver of the public notice and bidding requirement for contracts awarded to State employees in excess of \$2000. The DIAA cited the nature of the allegations, the high profile nature of the investigation and the impending graduation of some of the witnesses/participants as reasons for the hardship waiver.

II. APPLICATION OF THE FACTS TO THE LAW

A. State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with, or is regulated by the State. 29 Del. C. § 5806(d).

Ms. Sullivan's written submission and her comments at the hearing constituted full disclosure for purposes of the Commission's consideration.

B. In their official capacity, honorary state officials may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

"A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). A person has a personal or private interest when they, or a close relative, have a financial interest in a private enterprise." 29 Del. C. 5805(a)(2). 'Matter' is defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(7).

Ms. Sullivan's work for CPU is not related to her proposed work as an investigator for DIAA, nor do her CPU job duties involve DIAA or their personnel. As a result, she would not be placed in a position to review or dispose of matters related to DIAA while performing her regular CPU job duties. In addition, although DIAA and the CPU are both Divisions of DOE, the administration of the two Divisions is overseen by two different DOE Deputy Secretaries. As a result, Ms. Sullivan would not report to the same individual regarding the investigation as she does when working for CPU.

C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens

are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

According to Ms. Makransky, the DIAA tried to hire two other investigators before turning to Ms. Sullivan. Locating a qualified, licensed investigator who does not work in New Castle County (where the incident took place) is a very specific job description in a state with a comparatively small applicant pool. Ms. Sullivan's background as a retired State Trooper, college athlete and coach, along with her familiarity of DOE investigatory procedure makes her abundantly and uniquely qualified to conduct the DIAA inquiry. In addition, while the work required by the DIAA contract is similar to Ms. Sullivan's State job duties, there appeared to be enough geographic separation and subject matter distinction between the two roles that the public would not be suspicious that she was acting contrary to the public trust.

D. State employees may not contract with the State if the contract is more than \$2,000, unless it is publicly noticed and bid. 29 Del. C. § 5805(b)(1).

Due to the impending deadlines for completion of the investigation and the report, the contract had not been publicly noticed and bid. The DIAA requested a waiver of this provision of the Code of Conduct. One of the reasons for the public notice and bidding requirement is to provide assurance that State contracts are awarded only after all individuals have had an equal opportunity to submit a bid. In this matter, the benefits of the public notice and bidding requirement were weighed against the DIAA's need to quickly investigate the incident that occurred at the basketball game.

The Commission decided that the public's interest in a thorough investigation into the allegations surrounding the basketball game outweighed that of the public's assurance that the contract was equally available to everyone. Three factors that weighed in favor of the waiver were the facts that the DIAA had previously tried to hire other detectives, with no success; Ms. Sullivan was billing the State at 50% of the usual rate the DOE paid for investigative services, thus assuring that the State was paying fair market value for her services; the incident at the basketball game was covered by the media, raising the profile of the incident and increasing the number of persons interested in a full accounting of what actually happened.

E. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(a) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992)).*

One reason cited by DIAA for the urgency was the impending graduation of witnesses/participants at the end of the school year. A.I. du Pont High School had nine seniors on the basketball team that competed against Delaware Military Academy in February. Their last day of classes is May 26th. Ms. Makransky stated that the witnesses would be harder to locate after graduation because the investigator would not be able to rely upon school records for current contact information. In addition, as Ms. Sullivan pointed out at the hearing, potential witnesses would likely be more cooperative and invested in the investigation if they are still students of the school at the time of their interviews because their high school experience would not be thought of as an event which is "over".

Without a waiver the DIAA would be unable to move forward with the investigation until the public notice and bidding process had been completed. That would likely take at least 60 days. In the meantime, the school year will have ended, meaning the witnesses will have dispersed, making them more difficult to locate and less interested in participating in the investigatory process. If the

investigation is completed before the end of the school year, most of the witnesses could be found in one of two locations (i.e. the two high schools) and the students preparing to graduate will still view themselves as members of the school community, making them more likely to cooperate with the investigation.

After considering those facts, the Commission decided that DIAA had justified its hardship by establishing the fact that the quality of the investigation was likely to be diminished if it was delayed any longer.

(b) Is literal application of the law necessary to serve the public purpose?

As stated above, the purpose served by publicly noticing and bidding a contract is to insure there is no favoritism, etc., in awarding a contract to a State employee, and that others have an equal opportunity to compete. However, the public has an equal, if not greater, interest in ensuring that those responsible for incidents like the above referenced basketball game are accountable for their actions.

III. CONCLUSION

The Commission GRANTS a waiver of the Code of Conduct provision requiring contracts awarded to State employees in excess of \$2000 to be publicly noticed and bid based upon the hardship presented by the DIAA.

Sincerely,

/s/ William F. Tobin, Jr.

William F. Tobin, Jr.
Chair

cc: Patricia Davis, DAG



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VIA EMAIL

October 31, 2017

16-52--Post Employment—2nd WAIVER REQUEST (GRANTED)

Hearing and Decision By: *William F. Tobin, Jr., (Chair); Bonnie Smith (Vice Chair), Michele Whetzel (Vice Chair); Commissioners: Lisa Lessner, Jeremy Anderson, Esq.*

Dear Ms. White,

Thank you for attending the Commission meeting on October 17, 2017. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your agency's request for a six month extension of the waiver previously granted to your agency in October 2016. The Commission's reasoning is set forth below.

I. FACTS

You are the Director of the Women, Infants and Children ("WIC") program within the Division of Prevention and Behavioral Health Services ("PBHS"), Department of Services for Children, Youth and their Families ("DSCYF"). WIC is a program designed to help low-income pregnant, postpartum, and breastfeeding women, infants, and children under the age of 5 who are at nutritional risk. WIC provides vouchers to qualified individuals so they can obtain nutritious foods to supplement their diet, provides information about healthy eating options including breastfeeding, and makes referrals to health care.²

In order to qualify for a federal grant, the WIC program must have a Nutrition Coordinator. Laura Peppelman, Delaware's Nutrition Coordinator, retired on September 30th after 17 years of service. Two months prior to Ms. Peppelman's retirement, you posted the anticipated job vacancy on the State's website. To qualify for the position, candidates must be a Registered Dietician with three years of experience. In Delaware, there are 299 registered dieticians whose median annual salary is between \$47,000 and \$56,000. The posting resulted in only two qualified applicants. One applicant withdrew her application after learning of the offered salary, \$44,000 per year. The other applicant was interviewed and offered the position but she declined when she too learned of the salary.

² www.womeninfantschildrenoffice.com

In addition to administering the Nutrition Assistance Program, the employee serves as a preceptor to Dietetic Interns at the University of Delaware and also serves on the University's Intern Selection Committee. Your Division often recruits employees from the University's intern program.

You were concerned that the continued job vacancy would affect WIC's ability to meet their obligations to the University and the current class of Dietetic Interns as well as maintaining WIC's eligibility for the federal grant. You asked the Commission for a waiver of the two year post-employment restriction to allow PBHS to contract with Ms. Peppelman until you could fill her position, which was granted.

At the October 2017, meeting you stated that you had been able to hire someone to replace Ms. Peppelman. Your new employee's start date is in December 2017. You asked the Commission to extend the previously granted waiver for six months to allow Ms. Peppelman to train the new employee.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Ms. Peppelman would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission ordinarily compares the duties and responsibilities during employment to the post-employment activities. However, in this case, you acknowledged that your request to contract with Ms. Peppelman to perform her former job duties was a violation of the two year post-employment restriction in the Code of Conduct. Instead, you asked the Commission, on behalf of PBHS, to consider a waiver based upon agency hardship.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) **"Undue hardship,"** means "more than required" or is "excessive." *Commission Op. No. 97-18* (citing *Merriam Webster's Collegiate Dictionary*, p. 1290 (10th ed. 1992)).

You posted the vacancy well in advance of Ms. Peppelman's retirement. Even so, the posting only attracted two qualified applicants. Both of those applicants withdrew their application because of the low salary. In response, you requested approval to hire an applicant above the \$44,000 minimum salary which was denied. The position remained posted on the State website during the year the waiver was in effect. You had also posted the vacancy on a national website in the hopes of attracting a larger pool of applicants. Prior to granting the original waiver, WIC was out of compliance with the federal grant requirements, unable to meet its obligations to the University and to the public.

One factor the Commission evaluates when deciding to grant a waiver is whether the employee would be making more money as a contract employee than they were earning as a full-time State employee. Consideration of that factor is important when determining whether an employee, or ex-employee, has left State employment for the purpose creating a vacancy which would allow them to return as a contract employee at a higher salary. When asked about Ms. Peppelman's compensation as a contract employee, you stated Ms. Peppelman was earning less money than what she was earning when she left State employment and that continues to be the case.

Based on your difficulty recruiting qualified applicants, WIC's need to comply with the criteria of the federal grant, WIC's obligations to the University and the fact that the vacancy was not created to reap a financial benefit, the Commission decided to grant your agency's request for a hardship waiver of the post-employment restriction for a period of one year. During that year, you continued to post the opening on the State website and also posted the vacancy on other websites to attract a greater pool of applicants. As a result, you have successfully recruited a candidate to fill the position. Her start date is in December 2017.

You asked the Commission to extend the original waiver for another six months to allow Ms. Peppelman to train your new employee. As you described during the 2016 meeting, there are very compelling reasons to make sure the WIC program continues to run efficiently. Your new employee, although qualified for the position, has never worked for state government. You believe Ms. Peppelman's assistance in training the new employee would be invaluable and would prevent any lapses in services provided by your Division. The Commission agrees for all of the reasons supporting the original waiver.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32*. In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that

officials use public office for personal gain, particularly after they leave government services. There is a sense that a “revolving door” exists between industry and government; that officials ‘go easy’ while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not “unduly circumscribing their conduct.” 29 *Del. C.* § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 *Del. C.* § 5805(d) . *Commission Op. 01-07.*

Here, there were limited resources from which you could recruit to fill the vacancy. Now that you have filled that vacancy, the employee should be properly trained. In the meantime, the public has an interest in making sure that low-income individuals have access to resources which provide them with proper nutrition. Additionally, when the Commission grants a waiver, the decision becomes a matter of public record. That ensures that the public knows why a former State employee was allowed to contract with the State in contravention of the Code.

III. CONCLUSION

The Commission decided to GRANT your agency’s request to extend your hardship waiver for a period of six months.

Sincerely,

/s/ William F. Tobin, Jr.

William F. Tobin, Jr.
Chair



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VIA EMAIL

January 5, 2018

17-38--Post Employment--WAIVER REQUEST (GRANTED)

Hearing and Decision By: *Bonnie Smith (Chair), William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Jeremy Anderson, Esq., Lisa Lessner, Andrew Gonser, Esq. (recusing)*

Dear Dr. Tullis and Ms. Woodall,

Thank you for attending the Commission meeting on December 19th, 2017. After careful consideration of the relevant facts and circumstances, the Commission decided to GRANT your request for a waiver to allow Dr. Tullis to accept a position with Nemours to administer the newborn screening program. The Commission's reasoning is set forth below.

I. FACTS

Dr. Kathryn Tullis was the Director of the Children and Youth with Special Health Care Needs ("CYSHCN") program within the Department of Public Health ("DPH"). In that role she was the liaison between DPH and other State agencies who provide services to the same client population. As Director, Dr. Tullis supervised the Coordinator of the Newborn Screening Program ("NSP"). NSP contracts with birthing facilities to perform health screening tests on newborns. The program consists of the initial testing (laboratory) phase and the follow-up phase. NSP had been administered by DPH for 40 years and identified over 500 infants each year with potentially life-threatening diseases. During the past three years, Dr. Tullis had acted as the NSP program coordinator in addition to performing her own job duties.

The costs of maintaining the NSP had steadily increased and DPH chose to leave unstaffed positions vacant because of budgetary limits. Budget constraints, coupled with pressure from the birthing facilities to lower their fees, forced DPH to look for other ways to provide the program's services. As a result, DPH issued a Request For Proposal ("RFP") asking bidders to propose alternative ways of accomplishing the NSP's goals. Dr. Tullis assumed the lead role in the RFP process and was a member of the RFP review panel. The bids were independently scored by all members of the review panel and the successful bidder was Nemours.

Nemours posted the position of Manager of the Newborn Screening Program but did not find a qualified candidate. Even though she did not submit an application, Nemours offered the position to Dr. Tullis. Dr. Tullis believed that her knowledge of the program and her existing relationships with birthing facilities and other providers would help ensure a successful transition of the NSP from DPH to Nemours.

Leah Woodall, a DPH Section Chief, wrote separately to support Dr. Tullis' employment with Nemours. Ms. Woodall stated that DPH (and their clients) would benefit from Dr. Tullis' prior experience with the NSP would benefit the State by assuring continuity of care. She also noted that Nemours had reviewed any possible ethics dilemmas which may apply to the hiring of Dr. Tullis and had concluded that there were none. The Commission gave no weight to the fact that Nemours had conducted their own ethics inquiry because their standards are not governed by statute, as is the State Code of Conduct.

Ms. Woodall and Dr. Tullis asked the Commission for a waiver of the two year post-employment restriction to allow Dr. Tullis to work at Nemours as the coordinator of the revised NSP.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Dr. Tullis would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there was a substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. In this case, Ms. Woodall and Dr.

Tullis acknowledged that Dr. Tullis would be working on a matter for which she was directly and materially responsible while employed by the State, a violation of the two year post-employment restriction in the Code of Conduct.

The Commission next considered whether DPH or Dr. Tullis qualified for a waiver of the post-employment restriction.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992).*

Dr. Tullis has a background in genetics which, along with her historical knowledge of the NSP program, makes her uniquely qualified to manage the new program. In addition, her oversight will assure continuity of care while the program undergoes a seismic change from a state-run program to a privately-run program, paid for with State funds.

Another consideration which weighed in favor of a waiver was the impending change from testing samples at DPH's laboratory to testing at a private laboratory contracted by Nemours. The State's lab was scheduled to close-out their existing samples and all new samples were to be sent to the new laboratory effective January 1, 2018. The impending deadline made it impossible for Nemours to recruit and train a program manager in the seven remaining work days between the date of the meeting and January 1st.

While some of the problems DPH encountered in transferring the NSP to a private provider appeared to be the result of poor planning by either DPH or Nemours, the Commission decided that the agency had adequately demonstrated the existence of an agency hardship. As a result, the waiver was GRANTED for the above reasons and for the important public policy considerations listed below.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the

post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07*.

Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971}. (See *Commission Op. 13-34*, State employee could not work for a private entity on a grant that employee wrote while a State employee). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions.

In this case, Dr. Tullis, and Ms. Woodall, stated that the transfer of the NSP to a private entity would benefit the program and the families of newborns it serves. They anticipate that the Nemours program will provide better follow-up care because they have the resources to staff the positions DPH left vacant due to budget constraints. In addition, they expect the number of false-positives in the testing phase to drop dramatically due to the introduction of a modern laboratory facility that was selected by Nemours. False-positive test results create stress and emotional trauma for the families who have been mistakenly advised that their child may have a life-threatening disease. Obviously, measures to reduce such stressful situations would outweigh any concerns amongst the public regarding the outsourcing of the NSP program.

Another factor which weighed in favor of a waiver was the fact that the decision is a matter of public record. That ensures that the public knows why a former State employee was allowed to work on a State contract in contravention of the Code. After consideration of all the relevant factors, the Commission decided that the public had an important interest in the sustainability of the NSP and the waiver was GRANTED.

III. CONCLUSION

Dr. Tullis is granted a waiver of the post-employment restriction in the Code of Conduct to allow her to accept the position as program manager at Nemours and to allow DPH to work with their former employee.

Sincerely,

/s/ Bonnie Smith

Bonnie Smith
Chair



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January 5, 2018

17-45--Post Employment--WAIVER REQUEST (GRANTED)

Hearing and Decision By: Bonnie Smith (Chair), William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); ***Commissioners:*** Jeremy Anderson, Esq., Lisa Lessner, Andrew Gonser, Esq.

Dear Ms. Webb and Dr. Silverman,

Thank you for attending the Commission meeting on December 19th, 2017. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your request for a waiver to allow Dr. Silverman to work with DPH for the purpose of creating a program to address the over-prescription of opioid substances in Delaware. The Commission's reasoning is set forth below.

I. FACTS

Ms. Webb is the Deputy Director of the Division of Public Health ("DPH") within the Department of Health and Social Services ("DHSS"). DPH is attempting to address the opioid crisis in Delaware. As part of that effort, DPH secured a grant from the federal government to identify and educate physicians who are prescribing opioids in excess of accepted guidelines. The education efforts would be organized among State agencies and outside contractors. Ms. Webb proposed hiring a former DPH employee, Dr. Silverman to evaluate and report program activities to the federal government and to State agencies. When the grant was originally written, DPH had identified an employee who was to be responsible for the implementation of the program. However, she left DPH before the work on the program began. Ms. Webb stated that DPH's staff was already working at full capacity and some of the deadlines related to the grant were in January 2018. Because time was a consideration, she believed hiring Dr. Silverman would be the fastest and easiest way to implement the program.

Dr. Silverman retired from his position as Associate Deputy Director of DPH on April 1, 2017. He had discussed the program with DPH's Director, Dr. Karyl Rattay, prior to his retirement but he did not have any direct responsibilities for the program. If approved, he would work as a DPH consultant through a temporary employment agency and would work from home. He and Ms. Webb expect he would work approximately one day per week for less than one year. Work Dr. Silverman would

complete includes providing the Division of Professional regulation the data necessary to define the target population, approving content for the training program and selecting a vendor to conduct trainings. While Dr. Silverman would have contact with other DPH employees, he would not have contact with anyone who was in his former reporting structure.

Ms. Webb asked the Commission for a waiver of the two year post-employment restriction to allow DPH to contract with Dr. Silverman, a former employee.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

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The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Dr. Silverman would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there was a substantial overlap, the Commission compared the duties and responsibilities during State employment to the post-employment activities. Like the matter in *Beebe*, Dr. Silverman worked on the subject matter, public health, while working for the State. In this case, Dr. Silverman would be working on a new federal grant awarded to the State. However, his involvement with the grant prior to his retirement (i.e. developing the broad concepts of the project and discussing strategy with Dr. Rattay) led the Commission to believe that his involvement with the program after his retirement would violate the two year post-employment restriction in the Code of Conduct

The Commission then turned to a consideration of the waiver request.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992)).*

Ms. Webb stated that progress on the grant program was already behind schedule and more deadlines were imminent. Failure to meet the grant's deadlines could lead to a partial forfeiture of the \$4 million federal grant. She further stated that time constraints would prevent DPH from recruiting and hiring another person to perform the work. Ms. Webb believed that Dr. Silverman was the best candidate for the job because he was already familiar with DPH, knew their agency partners and he could begin working on the program immediately.

The Commission decided that given the immediate need to meet the grant's timeline, the agency had adequately justified the existence of an agency hardship.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. "*Ethics in Government Act, Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

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On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07.*

Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). (See *Commission Op. 13-34*, State employee could not work for a private entity on a grant that employee wrote while a State employee). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions.

The Commission weighed any possible public concern over Dr. Silverman's post-retirement work for DPH against the public's interest in preventing opioid addiction and overdoses. Ms. Webb stated that Delaware had 308 opioid-related deaths in 2016. The grant would pay for education that could not only prevent deaths, but could also prevent addiction from happening in the first place. The Commission also noted that if a waiver was granted that the decision becomes a matter of public record. That ensures that the public knows why a former State employee was allowed to work on a State contract in contravention of the Code.

III. CONCLUSION

The Commission GRANTED your request for a waiver to allow Dr. Silverman to work on the federal grant awarded to DPH based upon agency hardship and because to deny the waiver would not serve the public purpose of the statute.

Sincerely,

/s/ Bonnie Smith

Bonnie Smith
Chair